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IN THE  
**Supreme Court of the United States**

394  
**No. 52 Misc.**

                      
**October Term, 1952.**  
                    

**ROBERTA WELLS, As Administratrix of the Estate of  
CHEEK WELLS,**

*Petitioner,*

*v.*

**SIMONDS ABRASIVE COMPANY,**

*Respondent.*

**BRIEF FOR RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI  
AND APPENDIX.**

                      
**PHILIP PRICE,**

13th Floor, Packard Bldg.,  
Philadelphia 2, Pa.,

*Attorney for Respondent.*

**BARNES, DECHERT, PRICE,  
MYERS & RHODES,  
Of Counsel.**

                      
International, 236 Chestnut St., Phila. 6, Pa.



## INDEX TO BRIEF FOR RESPONDENT.

	Page
OPINIONS BELOW .....	1
JURISDICTION .....	1
QUESTIONS PRESENTED .....	2
STATUTES INVOLVED .....	2
ARGUMENT .....	3
I. Introduction .....	3
II. The Pennsylvania Wrongful Death Act and Survival Act Provide Different Rights of Action With Separate Limitation Pro- visions .....	5
III. The Alabama Homicide Act Is a Death Statute .....	11
IV. In Pennsylvania All Death Actions Are Barred After One Year by the Act of 1855. ....	16
V. The Full Faith and Credit Clause Does Not Affect Pennsylvania's Limitation of For- eign Wrongful Death Actions .....	18
VI. Conclusion .....	23
APPENDIX—STATUTES REFERRED TO IN RESPONDENT'S BRIEF .....	25
Pennsylvania Statutes .....	25
Wrongful Death Acts .....	25
Section 35(a) of the Fiduciaries Act of 1917. ..	26
Act of July 2, 1937 .....	26
Alabama Statutes .....	27
Homicide Act .....	27
Survival Acts .....	27

## TABLE OF CASES CITED.

	Page
Angel v. Bullington, 330 U. S. 183 (1947) .....	16
Bacon, et al. v. Howard, 20 How. 22 (1857) .....	20
Bank of Alabama v. Dalton, 9 How. 522 (1850) .....	20
Bank of the United States v. Donnelly, 8 Pet. 361 (1834) .....	21
Breed v. Atlanta B. & C. R. Co., 241 Ala. 640, 4 So. 2d 315 (1942) .....	15
Bruce v. Collier, 221 Ala. 22, 127 So. 553 (1930) 4, 11, 13, 15	
Echon v. Pennsylvania Railroad Co., 365 Pa. 529, 532, 76 A. 2d 175 (1950) .....	10, 16
Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938) ..	21
Ferne v. Chadderton, 363 Pa. 191, 69 A. 2d 104 (1949) ..	8, 10
First National Bank of Chicago v. United Airlines, Inc., 342 U. S. 396 (1952) .....	20, 21
Fisher v. Hill, 368 Pa. 53, 81 A. 2d 860 (1951) .....	10
Foley v. The Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A. 2d 517 (1949) .....	10, 16
Funk v. Buckley & Co., Inc., 158 Pa. Super. 586, 45 A. 2d 918 (1946) .....	7, 8
Griffin, Admr. v. McCoach, 313 U. S. 498 (1941) .....	3
Guaranty Trust Co. v. York, 326 U. S. 99 (1945), 3, 11, 16, 17, 22	
Hughes v. Fetter, 341 U. S. 609 (1951) .....	20, 21
Hughes v. Lucker, 174 F. 2d 285 (C. A. 3rd, 1949) .....	23
Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1940) .....	15
Kennedy v. Davis, 171 A. 609, 55 So. 104 (1911) .....	11
Klaxon Co. v. Stentor Co., 313 U. S. 487 (1941) .....	3, 21
McElmoyle v. Cohen, 13 Pet. 312 (1839) .....	20
Moore v. Illinois Cent. R. R., 312 U. S. 636 (1941) .....	3
Murray v. P. T. C., 359 Pa. 69, 58 A. 2d 323 (1948) .....	8

## TABLE OF CASES CITED (Continued).

	Page
Order of Travelers v. Wolfe, 331 U. S. 586 (1947) . . .	21
Pacific Ins. Co. v. Comm'n., 306 U. S. 493 (1939) . . . . .	22
Parker v. Fies & Sons, 243 Ala. 348, 10 So. 2d 13 (1942) . . . . .	4, 11, 13
Pezzulli v. D'Ambrosia, 344 Pa. 643, 26 A. 2d 659 (1942) . . . . .	7, 8
Piacquadio v. Beaver Valley Service Co., 355 Pa. 183, 49 A. 2d 406 (1946) . . . . .	8, 9
Radobersky v. Imperial Vol. Fire Dept., 368 Pa. 235, 81 A. 2d 865 (1951) . . . . .	7, 13
Regan v. Merchants Transfer & Warehouse Co., 337 U. S. 530 (1949) . . . . .	11, 16, 17
Rosenzweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931) . . . . .	16, 20
Smith v. Lilley, 252 Ala. 425, 41 So. 2nd 175 (1949) 4, 11, 13	
Stafford v. Roadway Transit Co., 165 F. 2d 920 (C. A. 3d, 1948) . . . . .	16
Stegner v. Fenton, 351 Pa. 292, 40 A. 2d 473 (1945) . . .	8, 9, 15
Strain v. Kern, 277 Pa. 209, 120 Atl. 818 (1923) . . . . .	7
Webb v. French, 228 Ala. 43, 152 So. 215 (1934) . . . . .	11, 15
Woods v. Interstate Realty Co., 337 U. S. 535 (1949) . . .	21
Zellmer v. Acme Brewing Co., 184 F. 2d 940 (C. A. 9th, 1950) . . . . .	23

## STATUTES AND AUTHORITIES CITED.

	Page
Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. § 1254) .....	1
Alabama Homicide Act—Tit. 7, Code of Alabama 1940, Section 123 ... 2, 3, 4, 5, 11, 12, 13, 14, 15, 17, 18, 27	
Alabama Survival Acts—Tit. 7, Code of Alabama 1940, Sections 150 and 153 .....	2, 3, 27
Constitution of the United States, Article IV, Section 1 .....	2, 18, 20
Fiduciaries Act of 1949—Act of April 18, 1949, P. L. 512, art. VI, § 603, 20 P. S. § 320.603 .....	7, 8
Goodrich-Amram Procedural Rules Service, § 2201-38° .....	6
Goodrich-Amram Procedural Rules Service § 2201-2 p. 6 .....	7
Pennsylvania Rule of Civil Procedure 2202(a) .....	6, 7
Pennsylvania Rule of Civil Procedure 2202(b) .....	6
Pennsylvania Survival Acts—Act of June 7, 1917, P. L. 447, Section 35(a) (as amended), 20 P. S. Ch. 3, App. Section 771; Act of July 2, 1937, P. L. 2755, Section 2, 20 P. S. Ch. 3, App. Section 772 .....	2, 5, 6, 7, 8, 11, 12, 13, 14, 15, 17, 18, 19, 26
Pennsylvania Wrongful Death Acts—Act of April 15, 1851, P. L. 669, Section 19, 12 P. S. Section 1601; Act of April 26, 1855, P. L. 309, Sections 1 and 2 as amended), 12 P. S. Sections 1602 and 1603, 2, 3, 4, 5, 6, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 25, 26	
Restatement of Conflict Laws § 397, Comment (b) ...	21



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**ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF  
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*Petitioner,*

*v.*

**SIMONDS ABRASIVE COMPANY,**

*Respondent.*

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**BRIEF FOR RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI.**

—  
**OPINIONS BELOW.**

The opinion of the District Court for the Eastern District of Pennsylvania is reported in 102 F. Sup. 519.

/ The opinions of the Court of Appeals for the Third Circuit are reported in 195 F. 2d 814.

**JURISDICTION.**

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. § 1254).

**QUESTIONS PRESENTED.**

1. In a diversity action for a wrongful death which occurred in Alabama, brought by an Alabama administratrix in a Federal Court sitting in Pennsylvania, should not plaintiff's right of action be barred by the one-year limitation provision of the Pennsylvania Wrongful Death Act, since such a right of action would have been so barred had suit been brought in a Pennsylvania Court based on a death which had occurred in Pennsylvania?

2. May not a Federal Court in a diversity action apply the limitation provision of the State of the forum to a foreign right of action for wrongful death without violating the full faith and credit clause of the United States Constitution?

**STATUTES INVOLVED.**

The statutes involved are:

The Alabama Homicide Act. Tit. 7, Code of Alabama 1940, Section 123.

The Alabama Survival Acts. Tit. 7, Code of Alabama 1940, Sections 150 and 153.

The Pennsylvania Wrongful Death Acts. Act of April 15, 1851, P. L. 669, Section 19, 12 P. S. Section 1601; Act of April 26, 1855, P. L. 309, Sections 1 and 2 (as amended), 12 P. S. Sections 1602 and 1603.

The Pennsylvania Survival Acts. Act of June 7, 1917, P. L. 447, Section 35(a) (as amended), 20 P. S. Ch. 3, App. Section 771; Act of July 2, 1937, P. L. 2755, Section 2, 20 P. S. Ch. 3, App. Section 772, and

The Constitution of the United States, Article IV, Section 1.



## ARGUMENT.

## I. Introduction.

The decision of the Court below was clearly right. It is in accord with the only other decision of a Court of Appeals on the point at issue, correctly interprets the law of Alabama and Pennsylvania and is not at variance with any decision of this Court. The case involves the proper interpretation of the statute law of Alabama and Pennsylvania and presents no new question requiring adjudication by this Court.

Since the present action was founded solely upon diversity of citizenship, the District Court was required to apply the Statute of Limitations of Pennsylvania; *Guaranty Trust Company v. York*, 326 U. S. 99 (1945); *Moore v. Illinois Cent. R. R.*, 312 U. S. 630 (1941); and was also bound to apply the Conflict of Laws Rules of that State, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941); *Griffin, Admr. v. McCoach*, 313 U. S. 498 (1941).

Petitioner's right of action was created by the Wrongful Death Act of Alabama, which is known in Alabama as the Homicide Act, Tit. 7, Code of Ala. 1940, § 123 (Respondent's Appendix, p. 27). An action under that Act may be brought within two years after the death. The Pennsylvania Wrongful Death Acts, which are commonly construed together as if they were but one Act, are the Acts of April 15, 1851, P. L. 669, § 19, and April 26, 1855, P. L. 309, §§ 1, 2 (Respondent's Appendix pp. 25, 26). Under those acts suit must be brought within one year after the death.

If an action is brought in Alabama to recover damages for personal injuries, and the plaintiff dies from some cause unrelated to the accident, his personal representatives may continue the suit so brought, Tit. 7, Code of Ala. 1940, §§ 150 and 153 (Respondent's Appendix p. 27); but if the plaintiff's death results from the negligent act on which his suit for personal injuries was based, the decedent's

action does not survive to his personal representatives, *Bruce v. Collier*, 221 Ala. 22, 127 So. 553 (1930). In such case the only right of action is in the personal representatives under the Homicide Act and a new action must be brought under that Act. *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2nd 13, 14 (1942); *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2nd 175, 179 (1949).

Unlike Alabama, Pennsylvania has, in addition to the Wrongful Death Acts of 1851 and 1855, a Survival Act, the Act of July 2, 1937, P. L. 2755 § 2 (Respondent's Appendix, p. 26). That Act, under which suit may be brought within two years after the death, creates a right of action unknown in Alabama and which authorizes the personal representatives of a person killed by another's negligence themselves to bring suit to enforce, for the benefit of the estate of the deceased, the right of action which accrued to the deceased at common law because of the tort, and in this manner to recover for his estate, as distinguished from his widow, children or parents, whose right of action exists under the Act of 1855, such amount as he himself might have recovered had he lived.

The District Court and the Court of Appeals held that the Alabama Homicide Act was a death statute, whose counterpart in Pennsylvania was the Act of 1855, and therefore that the one-year period of limitation contained in the Pennsylvania Act barred the present action. The Courts below distinguished the Pennsylvania Acts of 1855 and 1937 and, following the interpretation given them by the Supreme Court of Pennsylvania, reached the conclusion that, since the Pennsylvania Act of 1937 was not a death statute and did not purport to create a right of action similar to that created by the Alabama Homicide Act, the period of limitation which governed actions brought under it was inapplicable to the present action, just as the periods of limitation applicable to actions in assumpsit, or to the exercise of any other rights, were equally inapplicable.

Throughout her petition, petitioner has persistently refused to recognize the distinction between the two types of action created by the Pennsylvania statutes, and asserts that because the Pennsylvania Survival Act of 1937 creates a right which may be asserted by the personal representatives of the deceased within two years after the death, she, as the personal representative of her deceased, may assert the right granted her by the Alabama death statute within the same period of time. In so doing she claims that there is really no difference between the Pennsylvania death statute and the Pennsylvania survival statute.

An examination of the statutes of Pennsylvania and of the decisions of the Supreme Court of Pennsylvania construing them shows that the petitioner's position is directly contrary to that taken by the Supreme Court of Pennsylvania and that the Courts below were clearly right in their interpretation of the Pennsylvania law. Because of the bizarre interpretation of the Pennsylvania law devised by the petitioner, those decisions must now be reviewed in some detail.

## **II. The Pennsylvania Wrongful Death Act and Survival Act Provide Different Rights of Action With Separate Limitation Provisions.**

Petitioner's entire argument is based on the false premise that there is no difference between the Wrongful Death Act of 1855 and the Survival Act of 1937, and that, irrespective of the nature of the cause of action created by the Alabama Homicide Act, she is entitled to bring her action within the two-year period of limitation of the Pennsylvania Act of 1937 and thus avoid the one-year period of limitation of the Pennsylvania Act of 1855.

Petitioner places reliance on the fact that suits under the Alabama Homicide Act and under the Pennsylvania Survival Act of 1937 must be prosecuted by the personal representatives of the deceased, and throughout her petition petitioner has emphasized, by underlining and other means, that she is suing in a representative capacity. How-

ever, this is totally without significance, since under the Pennsylvania Rule of Civil Procedure 2202(a) actions for wrongful death under the Act of 1855 must also be brought by the decedent's personal representative, and under Pa. R. C. P. 2202(b) may be so brought. But, even though the proper plaintiff in suits in Pennsylvania brought either under the Death Act of 1855 or the Survival Act of 1937 is the personal representative of the deceased, the Pennsylvania Courts have carefully preserved the distinction between those two Acts and have recognized both the fundamental difference in the causes of action created by the two Acts as well as the difference in the beneficiaries for whom the actions may be brought under them.

Throughout her petition the petitioner has persistently confused the Pennsylvania Acts of 1855 and 1937 and has made statements which, if accepted uncritically, might lead one to suppose that the Pennsylvania Courts treated the two Acts as one and made no distinction between them, either for the purpose of determining the time within which actions must be brought under them or otherwise. However, the law of Pennsylvania cannot be determined from the petition, and thus the statements of the Supreme Court of Pennsylvania construing the Pennsylvania statutes must themselves be examined.

The Pennsylvania Wrongful Death Act consists of statutes enacted in 1851 and 1855, which, in Pennsylvania, are treated together as one Act, and provides a right of action unknown to the common law for the recovery of damages by designated relatives "whenever death shall be occasioned by unlawful violence or negligence." Suit must be brought within one year after death "and not thereafter." Act of April 15, 1851 P. L. 669, § 19; 12 P. S. 1601; Act of April 26, 1855, P. L. 309, § 1, as amended by Act of April 1, 1937, P. L. 196, § 1, 12 P. S. 1602; Act of April 26, 1855, P. L. 309, § 2, 12 P. S. 1603 (Respondent's Appendix, pp. 1a, 2a). This is the only statutory basis for the "true action for wrongful death." *Goodrich-Amram Procedural Rules Service*, § 2201-38. It establishes a right of action in the



beneficiaries to recover damages accruing to them because of the decedent's death. *Pezulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. 586, 590, 45 A. 2d 918, 920 (1946). Under Pa. R. C. P. 2202(a) actions for wrongful death are brought, as are survival actions, by the decedent's personal representative.

Section 35(a) of the Fiduciaries Act of 1917 provides for the continuation by the personal representative of a decedent of an action for personal injuries<sup>1</sup> actually begun by the decedent during his lifetime. Act of June 7, 1917, P. L. 447, § 35a, as amended by Act of March 30, 1921, P. L. 55, § 1, 20 P. S. Ch. 3, App. 771 (Respondent's Appendix, p. 26). This is not a death statute at all. Its only effect is to enable the personal representative to continue the same suit started by the decedent before he died, which is "not 'an action to recover damages for a death'", *Radobersky v. Imperial Vol. Fire Dept.*, 368 Pa. 235, 243, 81 A. 2d 865, 869 (1951), but "still an action for personal injuries." *Id.* at p. 241. The fact that the decedent has died does not convert the suit into an action for wrongful death. *Goodrich-Amram Procedural Rules Service* § 2201-2 p. 6.

The Act of 1937, amending § 35(b) of the Fiduciaries Act of 1917, provides for the commencement and prosecution by the personal representative of an action for personal injuries to the decedent.<sup>2</sup> Act of July 2, 1937, P. L.

1. The section covers all types of personal actions, except libel and slander, as well as actions for mesne profits and for trespass to real property. Its provisions are now embodied in the Fiduciaries Act of 1949. Act of April 18, 1949, P. L. 512, art. VI, § 601, 20 P. S. 320.601. Although referred to by petitioner, this section has no application where, as here, no suit was instituted by the decedent in his lifetime which the personal representative seeks to continue.

2. § 35(b) was re-enacted changing only the title to eliminate the constitutional objection raised in *Strain v. Kern*, 277 Pa. 209, 120 Atl. 818 (1923). The section covers

2755, § 2, 20 P. S. Ch. 3, App. 772 (Respondent's Appendix, p. 26). This also is not a "death statute" but merely enables the decedent's personal representative to bring a separate suit on the right of action for personal injuries that had accrued to the decedent at common law because of the tort. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. 586, 591, 45 A. 2d 918, 920 (1946). In *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945), for the declared reason that the Act of 1937 was a "survival" act and not a "death" statute like the Wrongful Death Act, *id.* at p. 295, the Pennsylvania Supreme Court held that it was subject to the two-year statute of limitations instead of the one-year provision of the Act of 1855.

The Pennsylvania courts have always recognized a clear distinction between the right of action for wrongful death and the right of action under the Act of 1937. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Stegner v. Fenton*, 351 Pa. 292, 294, 40 A. 2d 473, 474 (1945); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Murray v. P. T. C.*, 359 Pa. 69, 71, 58 A. 2d 323, 324 (1948); *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. 586, 590, 45 A. 2d 918, 920 (1946). In *Pezzulli v. D'Ambrosia*, *supra*, the distinction was defined by the Court in the following passage (344 Pa. at p. 647, 26 A. 2d at p. 660):

• "Under the present statutory law of Pennsylvania, if a suit for personal injuries is not brought during his life by the person injured two actions may be

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all types of personal actions, except libel and slander, as well as actions for mesne profits and for trespass to real property. Its provisions are now embodied in the Fiduciaries Act of 1949. Act of April 18, 1949, P. L. 512, art. VI, § 603, 20 P. S. § 320.603.



brought after his death (as they were in the present instance) for the recovery of damages—one under the acts of 1851 (section 19) and 1855, the other under the act of 1937. *Such actions are entirely dissimilar in nature.* The one represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence; the damages recoverable are measured by the pecuniary loss occasioned to them through deprivation of the part of the earnings of the deceased which they would have received from him had he lived. The other is not a new cause of action at all, but merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort; . . .” (Emphasis supplied.)

This distinction has, of course, been extended to the limitation provisions applicable to suits arising under these Acts. In *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945), the Supreme Court of Pennsylvania traced their history and held that suits under the Act of 1937 are subject to the two-year statute of limitations while actions under the Wrongful Death Act are subject to its one-year limitation provision. *Id.* at p. 296. In reaching this conclusion the Court said (351 Pa. at p. 295, 40 A. 2d at p. 475):

“By no stretch of imagination can the provisions of that act [the Act of 1855] be grafted upon the ‘*survival*’ Act of 1937, supra, which was passed for an entirely different purpose. *The Acts of 1851 and 1855, supra, are ‘death’ statutes, not ‘survival’ acts.*” (Emphasis supplied.)

In *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 49 A. 2d 406 (1946), the Supreme Court of Pennsylvania held that a complaint in a wrongful death action could not be amended more than two years after the injury to include an action for damages under the Act of

1937. The Court distinguished the two types of action in the following language (355 Pa. at p. 185, 49 A. 2d at p. 407):

“Although they arise out of a common factual background, the death action under the Acts of 1851 and 1855, is a separate and distinct cause of action from the cause of action for the decedent’s injuries, which survives his death under the Act of 1937. ‘The one represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another’s negligence . . . . The other is not a new cause of action at all, but merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort’ . . . . Different statutes of limitation apply to the two causes of action. The one-year limitation of the Wrongful Death Act is not applicable to a suit brought pursuant to the Survival Act.” (Emphasis supplied.)

The Supreme Court of Pennsylvania has consistently recognized the distinction between the rights of action under the Wrongful Death Act of 1855 and the Survival Act of 1937. See *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Fisher v. Hill*, 368 Pa. 53, 60, 81 A. 2d 860, 864 (1951). And it has also continued to recognize, as it must in the absence of legislative modification, the one-year limitation provision of the Wrongful Death Act. See *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950); *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 9, 68 A. 2d 517, 521 (1949).

Completely ignoring these decisions, petitioner says (petition pp. 12 and 14) that the Act of 1937 is “sometimes” called a survival statute and, indeed, (p. 14) ventures to say that it is not a survival act at all and that any attempt to distinguish between the Pennsylvania Acts by describing one as a death statute and the other as a survival statute “is totally unjustified.”

It is quite clear, however, from a consideration of the foregoing cases, that the Supreme Court of Pennsylvania has carefully preserved the distinction between the two Acts, not only in respect of the measure of damages recoverable under each, but also of the separate periods of limitation that are applicable to them.

It accordingly becomes important to determine whether the Alabama Homicide Act is a death statute, which would make actions based upon it brought in Pennsylvania subject to the one-year limitation period of the Pennsylvania statute, or whether it is a survival statute which, under Pennsylvania law, would give a plaintiff bringing suit in Pennsylvania two years within which to assert his rights. As will be shown hereafter (pp. 16, 17), the policy of the State of Pennsylvania, to which the Federal Courts sitting therein must give effect, *Guaranty Trust Co. v. York*, 326 U. S. 99, 109 (1945); *Regan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949), is to permit plaintiffs whose rights of action arise under the statutes of other states to bring suits in Pennsylvania within, but not after, the expiration of the period of limitation applicable to like causes of action which arise in Pennsylvania, but the nature of the Alabama statute will first be examined.

### III. The Alabama Homicide Act Is a Death Statute.

Both the statute itself (Respondent's Appendix, p. 27) and the Alabama decisions interpreting it make it clear that the right of action that the Alabama Homicide Act creates is for wrongful death. *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2d 175, 179 (1949); *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2d 13, 15 (1942); *Bruce v. Collier*, 221 Ala. 22, 23, 127 So. 553, 554 (1930); *Webb v. French*, 228 Ala. 43, 45, 152 So. 215, 217, (1934); *Kennedy v. Davis*, 171 Ala. 609, 612, 55 So. 104, 105 (1911). The nature of the right created by the Alabama Act is succinctly stated in *Parker v. Fies & Sons*; *supra* 243 Ala. at p. 350, 10 So. 2d at p. 15):

*"Our Homicide Act is a death statute, a punitive statute to prevent homicides. It creates a new and distinct cause of action, unknown at common law. The cause of action comes into being only upon death from wrongful act.*

*"These concepts are so fully settled that further statement need not be indulged. Breed v. Atlanta, B. & C. R. Co., 241 Ala. 640, 4 So. 2d 315; Pickett v. Matthews, 238 Ala. 542, 192 So. 261; Anno. Code of 1940, Title 7 § 123."* (Emphasis supplied.)

In the same case the Court further emphasized its holding that the Alabama Homicide Act is a death statute and not a survival statute, and that it has no similarity to the Pennsylvania Survival Act of 1937, by saying (243 Ala. at p. 349, 10 So. 2d at p. 14):

*"The statute providing for survival of actions for 'injuries to the person' does not apply to actions for injuries from 'wrongful act resulting in death, with a consequent right of action under the Homicide Act. The survival statute has a field of operation in actions where death ensues from other causes. The lawmakers did not contemplate two actions by the same administrator against the same defendant for the same tort, prosecuted to separate judgments, one to recover for personal injuries for the benefit of the estate, and another for punitive damages for the benefit of next of kin."* (Emphasis supplied.)

The Alabama Court has also made it very clear that the Alabama Survival Act, which, of course, is not the act under which petitioner is suing, likewise has no relation to the Pennsylvania Survival Act of 1937. In Alabama a right of action survives and may be continued by the personal representative only if the death ensues from causes other than the accident on which the suit was based. Such a survival act is to that extent similar to Section 35a of the Fiduciaries Act of 1917 (Note 1, p. 7, *supra*; Respond-



ent's Appendix p. 26) but has no similarity whatever to the Pennsylvania Act of 1937, which authorizes personal representatives themselves to bring an action based upon the accident which caused their decedent's death while the separate cause of action under the Act of 1855 is also being prosecuted.

The Supreme Court of Alabama has held that the Homicide Act provides the exclusive remedy where death results from the same wrongful act that is the basis of decedent's suit for personal injuries, and in such case therefore a decedent's action does *not* survive to his personal representative. *Bruce v. Collier*, 221 Ala. 122, 127 So. 553 (1930). Under the Alabama Survival Acts the personal representative may revive a pending suit for personal injuries upon the death of the plaintiff from causes unassociated with his accident and may recover the same damages that the decedent might have recovered; but *if death results from the same negligent act*, the only right of action in the personal representative is not the common law right of the decedent to recover for personal injuries, which is the only right involved in the Pennsylvania Survival Act of 1937, pp. 7-8, *supra*, but the statutory right to recover for wrongful death created by the Homicide Act. Any suit begun by the decedent in his lifetime must be abandoned by his personal representative and, instead, a new suit for wrongful death must be instituted under the Homicide Act. *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2d 13, 14 (1942); *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2d 175, 179 (1949). Obviously the Homicide Act does not pretend to keep alive any right of action that the decedent might have had. It is not a survival act at all, and the essential nature of the right created by that Act is therefore wholly different from that provided by the Pennsylvania Survival Acts. Compare *Radobersky v. Imperial Vol. Fire Dept.*, 368 Pa. 235, 81 A. 2d 865 (1951).

The Alabama Homicide Act provides only a right of action for wrongful death which is in its essence the same

right of action created by the Pennsylvania Wrongful Death Act of 1855 and is wholly unlike the decedent's common law right of action for personal injuries that is continued in his personal representative under the Pennsylvania Survival Act of 1937. The Courts below were accordingly clearly right in applying the period of limitation provided by the Act of 1855 instead of that provided by the Act of 1937.

Not only has petitioner failed to give consideration to the interpretation of the Alabama statutes by the Supreme Court of Alabama, but she does not even refer to any of them. On page 10 of her petition she merely sets side by side some of the language contained in the Alabama Homicide Act and the Pennsylvania Survival Act of 1937 which provides that the personal representative of the deceased is the proper party plaintiff under both Acts, but she does not quote the portions of the Acts which show how different in substance they are. Again on page 15 she states that "Section 35-b of the Act of 1937 is not identical with Section 123 of the Alabama Code," a fact which is quite obvious even from a cursory examination of the two statutes, but also states that "the Pennsylvania Act of 1855 is still less like the Alabama Act." The latter statement could only be made by ignoring, as petitioner does, the interpretation of the Alabama Act placed on it by the Alabama Court and the interpretation of the Pennsylvania Act placed on it by the Pennsylvania Court. When consideration is given to the pertinent decisions of the Supreme Courts of Alabama and Pennsylvania it becomes clear that the cause of action created by both death statutes is identical and that neither has any similarity to the Pennsylvania Survival Act of 1937.

Even though, as in Pennsylvania, the personal representative of the decedent is the plaintiff, the Alabama cases make it clear that the action under the Homicide Act is brought for the benefit of the next of kin and not for the



estate as such. *Webb v. French*, 228 Ala. 43, 45, 152 So. 215, 217 (1934); *Bruce v. Collier*, 221 Ala. 22, 23, 127 So. 553, 554 (1930). Unlike the Pennsylvania Act of 1937, under which an action must be brought for the benefit of the estate alone, it does not purport to preserve and continue the right of the decedent to recover damages for personal injuries, but, as does the Pennsylvania Act of 1855, it creates a new right of action to recover damages for wrongful death for the benefit of surviving next of kin.

Likewise there is no significance in the words quoted from the Alabama Act by petitioner which provide that the "personal representative may maintain an action . . . if the intestate could have maintained an action for such . . . negligence, if it had not caused death." In her argument she seems to suggest that this phrase is like some language in *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945) and to imply that the Act therefore resembles the Act of 1937. However, the phrase has been interpreted by the Alabama courts as being merely for the purpose of permitting the pleading in an Alabama action for wrongful death of defenses arising from the participation of the decedent in the tort which resulted in his death, such as contributory negligence and assumption of risk. *Breed v. Atlanta B. & C. R. Co.*, 241 Ala. 640, 645, 4 So. 2d 315, 319 (1942). The phrase is merely an adaptation of a similar qualifying provision in Lord Campbell's Act which was not written into the Pennsylvania Wrongful Death Act but has been embodied therein by judicial interpretation. *Kaczorowski v. Kal-košinski*, 321 Pa. 438, 440, 184 Atl. 663, 664 (1940).

Petitioner's attempt to identify the Alabama Homicide Act with the Pennsylvania Survival Act of 1937 is accordingly without any justification whatever and it remains merely to determine whether the policy of Pennsylvania is to make the one-year period of limitation created by the Act of 1855 applicable not only to causes of action for wrongful death arising in Pennsylvania, but also to those which arise

under the statutes of other States which are sought to be enforced in the Courts of Pennsylvania. The answer to this question is also quite clear, as will now be shown.

#### IV. In Pennsylvania All Death Actions Are Barred After One Year by the Act of 1855.

The Pennsylvania decision which held that the Act of 1855 provided a period of limitation for all death actions brought in Pennsylvania Courts is *Rosenzweig v. Heller*, 302 Pa. 279, 153 Atl. 346 (1931). That case expresses what is still the law of Pennsylvania, and its holding that the Act of 1855 is a statute of limitation that operates not only on rights of action for wrongful death arising in Pennsylvania but also on those arising in other states which are sought to be enforced in Pennsylvania, has not been changed by the legislature nor has its effect been limited in any way by the courts. Pennsylvania wrongful death actions are still barred if not instituted within one year after the death, *Stafford v. Roadway Transit Co.*, 165 F. 2d 920, 923 (C.A. 3d, 1948); see *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950), following *Rosenzweig v. Heller*; and foreign wrongful death actions are likewise subject to the one-year limitation provision of the Pennsylvania Wrongful Death Act. See *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 10, 68 A. 2d 517, 521 (1949), following *Rosenzweig v. Heller*.

The Pennsylvania Court's interpretation of the Wrongful Death Act in *Rosenzweig v. Heller* is expressive of a state policy which, under the federal diversity jurisdiction, it is the duty of Federal Courts to enforce. *Angel v. Bullington*, 330 U. S. 183, 191 (1947); *Regan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949). The object of the diversity jurisdiction is to insure that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a state court." *Guaranty Trust Co. v. York*, 326 U. S. 99, 109 (1945). Thus, state statutes of limitation are given the

same effect in the federal courts as they would be given in the state courts. *Guaranty Trust Co. v. York, supra; Regan v. Merchants Transfer & Warehouse Co., supra.*

It is precisely that result which was accomplished by the judgment of the lower court in this case which prevented recovery on a foreign right of action for wrongful death where suit was instituted later than the period permitted in Pennsylvania. Any other disposition would have achieved the anomaly of allowing recovery to the plaintiff because the accident happened in Alabama, although if it had occurred in Pennsylvania she would have been barred from enforcing in the courts of that state her right of action for wrongful death.

Although in her first "Question Involved" petitioner says that "a Pennsylvania Statute gives a similar right to the personal representative, also with a two year limitation," implying that the "similar right" is a right similar to the right given by the Alabama Homicide Act under which she brought her suit, the cases heretofore considered (pp. 8 to 10, *supra*) show how misleading such a statement is.

Similarly on page 7 she says that Section 35(b) of the Act of 1937 gave the administratrix of a decedent killed in Pennsylvania a remedy available on April 19, 1950, without pointing out that the remedy so given was under the Survival Act of 1937 alone and not under the Death Act of 1855, and therefore was wholly unlike the remedy granted by the Alabama Homicide Act. Continuing, petitioner asserts obliquely that she was denied a remedy "similar" to that granted by the Act of 1937 "because her decedent was killed in Alabama," although it is quite clear that the right she sought to assert was not similar to the Pennsylvania Survival Act of 1937 at all but was similar only to the Pennsylvania Death Act of 1855, and that she was not denied any right "because her decedent was killed in Alabama" but solely because the Act of 1855 barred any death action such as was created by the Alabama Homicide Act if not brought within one year after the death. See Petitioner's Appendix, pp. 2a, 3a and 5a.

Throughout her petition, petitioner constantly makes statements which are only half truths and which, if applied to the Pennsylvania Act of 1855, the only Pennsylvania Act comparable to the Alabama Homicide Act under which she sued, are not true at all. Thus on page 15 of her petition she says "There can be no doubt that the public policy of Pennsylvania is to allow a two-year period for suits by the personal representative of one killed by negligent act who has not brought suit during his lifetime." If that statement be limited to the Survival Act of 1937, it is true, but if it be limited to the Death Act of 1855, it is false. (See p. 9, *supra*.) The confusion of petitioner's argument stems entirely from her failure to differentiate, as the Pennsylvania Courts have done, between the Acts of 1855 and 1937. As soon as that is done the sole basis for her argument vanishes.

**V. The Full Faith and Credit Clause Does Not Affect Pennsylvania's Limitation of Foreign Wrongful Death Actions.**

In the section of her petition based upon the Full Faith and Credit Clause of the Constitution petitioner continues merely to half-state the law of Pennsylvania and to ignore the difference between the Wrongful Death Act and the Survival Act. Thus, on page 16 she says that she was denied a remedy because her decedent was "killed in a sister state although recovery would be permitted under identical circumstances if the accident had happened in Pennsylvania," and again that she was required to bring suit within one year of the death of her decedent "whereas two years would have been allowed had the accident occurred in Pennsylvania." These statements are grossly deceptive. Obviously the petitioner could have brought and maintained a suit in Pennsylvania within two years if it had been a survival action alone, but the Alabama law creates no cause of action similar to that established in Pennsylvania by the Survival Act of 1937, and it is of course obvious that



petitioner has no right of action at all unless it is created by the law of Alabama. The District Court did not dismiss her suit because the death occurred in Alabama but because the only right of action created by Alabama law was a death action. Had the law of that state also created a survival action, which it has not, such an action could have been brought in Pennsylvania within two years after the death, but even if the death had occurred in Pennsylvania, petitioner could not have maintained a *death* action in Pennsylvania unless suit had been brought within one year after the death. Thus the statement appearing on page 16 of the petition that "if the accident had happened here (in Pennsylvania) . . . recovery would have been permitted" is false if applied to the only kind of recovery authorized by the Act under which petitioner sued, and true only if applied to an Act the like of which does not exist in Alabama and under which therefore petitioner's present action could not have been brought. Pennsylvania allows anyone, resident or non-resident, to bring a wrongful death action within one year and a survival action within two years, but plays no favorites and applies the same rules to all alike.

The decision below merely prevents the petitioner from bringing a death action in Pennsylvania later than a Pennsylvania resident could have brought a death action for a death occurring in Pennsylvania, and petitioner's statement on page 18 of her petition that "as construed by the Court below, the law of Pennsylvania, while allowing two years for suit by an administratrix whose decedent is killed in Pennsylvania, allows but one year if such killing is in Alabama" is merely another instance of her speaking of two entirely separate and distinct causes of action while giving the false impression that she is speaking only of one. However, petitioner obviously considers it necessary to create the confusion which arises from appearing to talk about the Act of 1855 while really speaking of the Act of 1937, since only by so doing can it be made to seem that

the Pennsylvania rule works one way for residents and another way for non-residents, and, without such a foundation, her argument based upon *Hughes v. Fetter*, 341 U. S. 609 (1951), falls to the ground.

The only thing that was decided in *Hughes v. Fetter* was that a state which has a wrongful death statute of its own cannot completely close the doors of its courts against a suit based upon a similar statute of another state. *Id.* at p. 611. The decision in that case turned on the fact that the statutory policy declared by the Wisconsin Supreme Court violated the Full Faith and Credit Clause because, while entertaining wrongful death actions for locally caused deaths, it excluded those of foreign origin. *Id.* at p. 612. That situation is fundamentally different from that in *Rosenzweig v. Heller*, p. 16 *supra*, in which the Pennsylvania Supreme Court applied the same statute of limitations to Pennsylvania and foreign death actions alike, and from this case, in which the District Court imposed the one-year limitation provision of the Pennsylvania Wrongful Death Act exactly as it would have been bound to do if the accident had occurred in Pennsylvania.

Thus neither *Hughes v. Fetter* nor *First National Bank of Chicago v. United Airlines, Inc.*, 342 U. S. 396 (1952), which followed it, has any bearing whatever on the present case, in which the plaintiff has been treated in the same way as a Pennsylvania resident would have been treated in the same circumstances.

In neither of those cases was there any intimation that the Full Faith and Credit Clause affected in any way the operation of the rule, which was first established by this Court over one hundred years ago, that the period of limitation of the forum is controlling, even though shorter than that granted by the state where the cause of action arose.

An early illustration of this rule is the case of *McElmoyle v. Cohen*, 13 Pet. 512 (1839), and it was re-affirmed in *Bank of Alabama v. Dalton*, 9 How. 522 (1850) and *Bacon, et al. v. Howard*, 20 How. 22 (1857). Cf. also *Bank of the*



*United States v. Donnelly*, 8 Pet. 361, 372 (1834), and *Order of Travelers v. Wolfe*, 331 U.S. 586, 607 (1947).

It is according clear that this Court has long given full effect to the statutes of limitations of the several states and held that, even though a claim was still not barred under the law of the state in which it arose, it could not be enforced in another state after the period of limitation fixed by the laws of such state.

This is in accord with the *Restatement of Conflict Laws* § 397, Comment (b), and is not in any sense inconsistent with the cases of *Hughes v. Fetter* and *First National Bank of Chicago v. United Airlines*. Those cases held invalid statutes which made the courts of one state unavailable at all to litigants whose cause of action arose in another state even though, had a like cause of action arisen locally, the courts would have entertained it; but it was not suggested in either case that a state could not put a time limit on the exercise of a right in its own courts, so long as the same limit applied equally to residents of the limiting state.

The additional emphasis given by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and the cases which followed it, to the elimination of both procedural and substantive differences between the remedy afforded by federal courts in diversity cases and that available in the state courts, is wholly inconsistent with the idea of exempting foreign plaintiffs in diversity cases from the effects of local statutes of limitation. Compare the statement appearing in *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 496 (1941), that "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side," since, as said by the Court in *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949), "For the purposes of diversity jurisdiction a federal court is 'in effect, only another court of the state . . . .'"

In *Pacific Ins. Co. v. Comm'n.*, 306 U. S. 493, 502 (1939), it was said:

"And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that *the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state*, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." (Emphasis supplied.)

Applying this doctrine to statutes of limitations, the Court in *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945), quoted with approval what was said by Judge Hand, dissenting in the court below (p. 111):

"In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws."

Continuing, the Court itself, in holding that in a diversity case a recovery cannot be had in a federal court sitting in a state whose statute of limitations would have barred the recovery had a suit been brought in the court of such state, said (p. 112):

"The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity of jurisdiction, it cannot be said too often, is the law of the States."

And following the rules announced by this Court in the foregoing cases the Courts of Appeal, in the only two cases that have been found in which such Courts have considered the question raised by the instant case, have reached the same conclusion. *Hughes v. Lucker*, 174 F. 2d 285 (C. A. 3rd, 1949); *Zellmer v. Acme Brewing Co.*, 184 F. 2d 940 (C. A. 9th, 1950).

#### VI. Conclusion.

In the present case petitioner is seeking in the Federal Court sitting in Pennsylvania not equal but more favorable treatment than Pennsylvania residents would be entitled to receive in a Pennsylvania Court, and it is accordingly submitted that the petition should be denied.

Respectfully submitted,

PHILIP PRICE,  
13th Floor, Packard Building,  
Philadelphia 2, Pa.,  
*Attorney for Respondent.*

BARNES, DECHERT, PRICE,  
MYERS & RHOADS,  
*Of Counsel.*



## APPENDIX.

### STATUTES REFERRED TO IN RESPONDENT'S BRIEF.

#### Pennsylvania Statutes. 7

#### WRONGFUL DEATH ACTS.

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned. (Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601.)

The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he, she or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other State or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth. If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death. (Act of April 26, 1855, P. L. 309, § 1; Act of June 7, 1911, P. L. 678, § 1; as amended by Act of April 1, 1937, P. L. 196, § 1, 12 P. S. (Supp.) § 1602.)



The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter. (Act of April 26, 1855, P. L. 309, § 2, 12 P. S. § 1603.)

#### SECTION 35(a) OF THE FIDUCIARIES ACT OF 1917.

No personal action hereafter brought, except actions for slander and for libels, and no action for mesne profits or for trespass to real property, shall abate by reason of the death of the plaintiff or the defendant, or by reason of the death of one or more joint plaintiffs or defendants; but the executor or administrator of the deceased party may be substituted as plaintiff or as defendant, as the case may be, and the suit prosecuted to final judgment and satisfaction. (Act of June 7, 1917, P. L. 447, § 35(a); Act of March 30, 1921, P. L. 55, § 1, 20 P. S. Ch. 3, App. § 771.)

#### ACT OF JULY 2, 1937.

Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

All such rights of action which were not barred by the statutes of limitation at the time of the death of decedent may be brought against his executors or administrators at any time within one year after the death of the decedent, notwithstanding the provisions of any statutes of limitations whereby they would have been sooner barred. (Act of June 7, 1917, P. L. 447, § 35(b); Act of March 30, 1921, P. L. 55, § 1; Act of May 2, 1925, P. L. 442, § 1; Act of July 2, 1937, P. L. 2755, § 2, 20 P. S. Ch. 3, App. § 772.)



## Alabama Statutes

## HOMICIDE ACT.

*Action for wrongful act, omission, or negligence causing death.* A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative, and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate. (Tit. 7, Code of Ala. 1940, § 123.)

## SURVIVAL ACTS.

All actions on contracts, express or implied; all personal actions; except for injuries to the reputation, survive in favor of and against the personal representatives. (Tit. 7, Code of Ala. 1940, § 150.)

No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within twelve months thereafter, be revived in the name of or against the legal representative of the deceased, his successor or party in interest; or the death of such party may be suggested upon the record, and the action proceed in the name of or against the survivor. (Tit. 7, Code of Ala. 1940, § 153.)